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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. TOMMY E. CEDENO et al., Defendants and Appellants.	G029226 (Super. Ct. No. 00SF0470) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard F. Toohey, Judge. Affirmed.

Patrick J. Hennessey, under appointment by the Court of Appeal, for Defendant and Appellant Tommy E. Cedeno.

Brett Harding Duxbury, under appointment by the Court of Appeal, for Defendant and Appellant Jose Luis Pancho.

Richard D. Miggins, under appointment by the Court of Appeal, for Defendant and Appellant Jake A. Yanez.

Law Offices of Russell S. Babcock, and Russell S. Babcock, under appointment by the Court of Appeal, for Defendant and Appellant Emanuel Torres Garcia.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Holley A. Hoffman and Maxine P. Cutler, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Tommy E. Cedeno, Jose Luis Pancho, Jake A. Yanez, and Emanuel Torres Garcia were all found guilty of kidnapping for carjacking and kidnapping for robbery. Cedeno, Pancho, and Yanez were sentenced to life in prison with the possibility of parole for the kidnapping for robbery offense. A second indeterminate term of life in prison with the possibility of parole for the other conviction was stayed. Garcia, who was also found guilty of recklessly evading a peace officer, was sentenced pursuant to the "Three Strikes" law to a total term of 36 years to life. On appeal, Cedeno and Pancho challenge the sufficiency of the evidence to support the jury verdict. Garcia, Pancho, and Yanez all assert the court made various instructional errors, and Cedeno maintains the court should have granted a motion for mistrial.[1] Finding none of their contentions have merit, we affirm.

The Facts

This case involves the carjacking, kidnapping, and robbery of a United Parcel Service (UPS) truck driver, Greg Sarconi. In the early evening on July 10, 2000, Sarconi picked up several hundred boxes of valuable computer memory parts from

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[1] All four defendants state they wish to join in arguments raised by each other if the matter would affect their judgment. We have considered all the issues raised as though the contentions were made on behalf of all four appellants (with the exception of the sufficiency of the evidence arguments unique to Cedeno and Pancho). However, for the sake of clarity, each argument will be discussed using only the individual's name who actually briefed the issue.

Viking Products in Rancho Santa Margarita. This last stop had become part of his normal route because each day the company shipped out a great deal of computer equipment nationwide.

Sarconi had a security escort for part of his drive back to UPS's offices. However, once he entered a toll road, he was left to drive alone. When he got off the toll road and stopped at a traffic light, he saw a blue Chevy Astro minivan suddenly drive in front of him and block the road. The van had no license plates.

Two Hispanic men exited the van and entered the open passenger side door of his delivery truck. Sarconi noticed one of the men had a pistol and was wearing a blue denim shirt and "Terminator-style" thick sunglasses. The second man wore an orange plaid flannel shirt. Sarconi was forced from his seat and onto the floor of the truck. After getting the cargo area unlocked, the gunman made Sarconi walk into the back of the truck while someone else drove the truck away. He overheard the men saying they were looking for "memory."

After a few minutes of driving, the truck was stopped. Sarconi was on his knees facing the wall of the truck. He was unable to see what was happening but could hear boxes being removed. He heard the men speaking Spanish. One of the men asked him, "Where is the memory." Sarconi responded that "the whole truck was memory except for the top right-hand shelf." The truck had only been stopped a short time when Sarconi heard a siren. One of the culprits said, "Policia, vamous (*sic*)" and the men quickly left in a van. Sarconi went to a nearby business and called the police. When he returned to his truck, Sarconi noticed several boxes outside of the truck and the truck's keys were missing.

Two witnesses saw the carjacking. While driving in his car, Joseph Sachem saw a blue van blocking a UPS truck and initially thought there had been an accident. He changed his mind when he saw someone hit the UPS driver and force him to the floor. Sachem then watched what looked like another UPS driver climb into the

driver's seat and start the truck. The blue van followed the UPS truck away from the intersection. Sachem called the police and followed the UPS truck for about one mile. He told the 911 dispatcher that there were five or six people in the blue van.

Kathryn Folsom saw two men get out of the blue van. She recalled one was Hispanic, wore blue clothing, and had a gun. She saw him assault the UPS driver. She decided to drive away after seeing three other Hispanic men drive by in a white pick-up truck and glare at her. She found a police officer and reported what she had witnessed. As the officer headed towards the site of the carjacking, Folsom saw the UPS truck, followed by the blue van, drive past her. She followed them until they turned into a storage area. She then flagged down another police officer and told him where the vehicles had gone.

Deputies James Johnston and Glenn McKeever were dispatched to investigate the matter. Driving towards a commercial area, they spotted a blue Chevy van with no license plates. They began following the van and could see several passengers moving about inside the van, and it looked as if they were trying to change their clothing. The officers turned on the patrol car's lights, but the van did not stop. After turning on their siren, the van pulled to the side of the road. The officers saw the passenger side door open, and Cedeno got out of the car. The van then drove away.

Johnston and McKeever continued to follow the van. Deputies John Auer and Spencer Muir, who were driving behind them, stayed with Cedeno. They watched Cedeno come towards them and asked him to put up his hands. When he refused, Muir tackled and detained him.

Meanwhile, the other officers watched the blue van drive through a stop sign and almost hit another car. Johnston saw that three people remained in the car. When the van finally stopped, all three occupants ran away. The first person to be stopped was Yanez. When handcuffing Yanez, the officer recalled Yanez "made a statement to the effect that he didn't think it was a good idea. He told them that it wasn't

a good idea." Garcia and Pancho were also eventually captured. The four men were arrested. Johnston recognized Garcia as the driver of the blue minivan. Officers found the UPS truck keys in Yanez's pocket. Yanez was wearing a brown shirt, brown shorts and black socks.

The van contained five boxes from Viking. It was later discovered that Washington Munoz owned the van and loaned it to Garcia the day before the incident. He testified the van had license plates before he gave it to Garcia.

The victim, Sarconi, and the witness, Sachen, were unable to positively identify any of the men. Folsom was unable to identify anyone from photographs but in court stated she was "pretty close to positive" she had seen Garcia.

Garcia, Cedeno, and Pancho did not present any evidence on their own behalf. Yanez testified he was completely innocent of any wrongdoing. First, to briefly summarize, Yanez's defense was that several men, who he did not know, tried to make him participate in the crimes by beating him. Yanez claimed he was afraid, but he refused to help the culprits, and he should be viewed as merely another victim.

Indeed, Yanez's story was full of twists and turns. Yanez explained that on the day of the incident, he had agreed to help some friends move furniture and first rode with several men in a new white Blazer truck. Along the way, the truck stopped and his friends asked him to switch places with a man in a bigger white moving truck. He agreed and fell asleep while riding in the second truck. Yanez said he awoke just in time to see two men force their way into a UPS truck. He recalled he was hit on the back of his head, pushed out of the truck, and commanded to drive the UPS van. Yanez said he refused, telling the men, "No way in hell I am driving."

Yanez claimed that as a consequence he was further beaten and dragged away into the Blazer truck. He was able to remember that the men took his wallet and drove him to a warehouse parking lot, hit him again, and dumped him out onto the ground and drove away. Yanez testified that in the parking lot he saw the UPS truck

again and saw the blue van for the first time. He stated the van was empty so he crawled inside and lay down on the floor. He was soon joined by the codefendants, who he had never met before. Yanez asserted he was disoriented at the time and was unaware of the police pursuit, although he did remember he heard police sirens. He admitted he ran with the others after the van finally stopped because he saw the police. However, he claims he stopped to help a police officer. He had no idea how the UPS truck keys got into his pocket. He admitted he was on probation at the time of his arrest and to avoid jail did not tell the police his true legal name.

Discussion

Sufficiency of the Evidence

Cedeno and Pancho each contend the evidence does not support their convictions. They both argue the evidence established three active participants and a "fourth man," who had no identifiable role in the matter. Cedeno and Pancho each claim the evidence suggests they played the role of the "fourth man." In considering their arguments we must "review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence – that is, evidence which is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) Despite the lack of eyewitness identification, we conclude it was reasonable for the jury to conclude from all the evidence that neither Cedeno nor Pancho were merely innocent bystanders.

Cedeno and Pancho agree their two codefendants were active participants in the crimes. They maintain Garcia drove the blue van. Indeed, the evidence established he borrowed the van from a friend. An officer testified he thought he saw Garcia driving it during the police pursuit. Cedeno and Pancho agree Yanez drove the UPS truck. After all, he was caught wearing clothing similar to the distinctive uniform worn by the UPS employees. The keys to the truck were found in his pocket. Through the simple process

of elimination this leaves someone to play the dreaded role of the gunman and the other to be the allegedly innocent "fourth man" waiting in the blue van. Not surprisingly, both Cedeno and Pancho point to select facts suggesting they were the "fourth man."[2]

After carefully reviewing the record, we find it is not necessary to determine which man was the gunman because the jury could reasonably conclude the "fourth man" was equally culpable -- as an aider and abettor. There was sufficient evidence the "fourth man" knew a crime had been committed and that he acted "with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense. [Citations.]" (*People v. Beeman* (1984) 35 Cal.3d 547, 560.)

Cedeno and Pancho do not dispute the "fourth man" was aware a crime had been committed. Garcia positioned the van directly in front of the UPS truck. By all accounts from other witnesses, it would have been easy for the "fourth man" sitting in the blue van to see Yanez and the gunman assault the UPS driver. The "fourth man" stayed in the blue van as it followed the commandeered UPS truck to a more secluded commercial area. Although it is unclear whether all four men helped move boxes from the UPS truck to the van, certainly anyone sitting in the van would have seen the transfer. Several stolen boxes were found in the van.

As noted by Cedeno and Pancho, being present at the scene of a crime is insufficient for aiding and abetting liability. We agree. However, "[w]hile mere presence at the scene of an offense is not sufficient in itself to sustain a conviction, it is a circumstance which will tend to support a finding that an accused was a principal. [Citations.] It is a circumstance to consider together with the accused's companionship

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[2] We wish to comment briefly on Cedeno's argument that evidence showing he voluntarily surrendered to the police suggests he did not have the same criminal intent as the others. The record shows Cedeno's "surrender" was not as peaceful as he suggests. After leaving the van he did not directly approach the police with his hands in the air. He jogged down the sidewalk and was forced to stop only after an officer drove over the curb and blocked his path. He failed to comply with the officer's orders and, consequently, was tackled to the ground and handcuffed.

and his conduct before and after the offense." (*People v. Laster* (1971) 18 Cal.App.3d 381, 388.)

Based on the whole record, the jury could reasonably infer the "fourth man" had the necessary intent to sustain a conviction. This was not a random act of violence but rather a carefully preplanned hit. The record shows the culprits knew the UPS truck would be carrying valuable computer memory, because they specifically asked the driver to show it to them. It can be reasonably inferred they knew the driver's normal route based on the manner in which they staged the carjacking. The four men waited until the security escort had departed before making their move. They used the same van to stop the UPS truck and make a quick getaway. The van, borrowed from someone the day before, had its license plates removed -- an additional precaution to hide the men's identities.

It is apparent that each man had a specific preplanned task in the scheme: Yanez knew to wear clothing similar to the distinctive UPS employees' brown uniform, presumably to avoid detection as the driver after the carjacking. Garcia's job was to stop the truck and transport the stolen goods in the van. The gunman's mission was to quickly remove the driver from his seat, conceal him from the public's view, and find the keys necessary to open the locked cargo area.

It was reasonable for the jury to conclude the "fourth man" was also assigned a specific task. He was in a position to serve as a lookout for the police. He was the only person readily available to assist the gunman if he needed help restraining the victim. Finally, it can be inferred that the "fourth man's" decision to remain in the van, knowing about the crime, was a tacit approval of the illegal acts occurring before him. The "fourth man" had at least two opportunities to leave before the police began to chase the van. Thus, it was reasonable for a trier of fact to conclude that, at a minimum, he "encouraged" the unlawful conduct by remaining and, therefore, aided and abetted the other culprits.

Motion for Mistrial based on Aranda-Bruton violation

Deputy Glenn McKeever testified he was the officer who caught and arrested Yanez. He stated, "Just before taking him down, he made a spontaneous statement that, 'You have got me. I give up.' And then, as I was proceeding with Deputy Sullivan to detain him and put handcuffs on him, [Yanez] made a statement to the effect that he didn't think it was a good idea. He told them that it wasn't a good idea." This information was not contained in the police report.

Pancho's trial counsel immediately objected, citing the rules set forth in *Burton v. United States* (1968) 391 U.S. 123 and *People v. Aranda* (1965) 63 Cal.2d 518: "'[A] nontestifying codefendant's extrajudicial self-incriminating statement that inculpates the other defendant *is generally unreliable and hence inadmissible* as violative of that defendant's right of confrontation and cross-examination, even if a limiting instruction is given.'" (*People v. Hill* (1992) 3 Cal.4th 959, 994, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn.13.) The court overruled the objection and later denied the three codefendants' joint motion for a mistrial. It reasoned, "The court does not find that the statements inappropriately implicated the other defendants in the face of the evidence that's before this court." However, based on Pancho's counsel's request, the court gave the jury a limiting instruction on the matter.[3]

On appeal, Cedeno asserts the court was mistaken. He argues, "The clear import of this statement is that, according to Yanez, the other defendants were aware of the crimes to be committed and were active participants." We find the challenged testimony did not send such a clear message. Was Yanez referring to a statement he

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[3] The court told the jury, "Before we take up the testimony of the next witness, I did have one instruction for the jury. [¶] During the course of the testimony of Deputy McKeever, he attributed certain statements to the defendant Yanez. [¶] And I am instructing the jury that you may consider those statements only as to the defendant Yanez. Those statements are not to be considered as against the other three defendants."

made to his codefendants or someone else? Did he believe robbing a UPS truck or fleeing on foot from the police was a bad idea? In any event, given the context in which the statement was made, it can be reasonably inferred Yanez's statement somewhat implicated the other defendants. The jury could have easily concluded Yanez, presumably unhappy about just being caught, noted that he had foreseen problems when the heist was initially planned. These concerns would have not been voiced to anyone other than his cohorts. Thus, contrary to the court's belief, there was potentially an *Aranda-Bruton* problem.

As correctly noted by the Attorney General, any problem is generally solved once the codefendant, who made the incriminating statement, testifies at trial. There is no "federal constitutional foundation for *Aranda's* exclusion of the statements of a codefendant who testifies and is cross-examined." (*People v. Boyd* (1990) 222 Cal.App.3d 541, 562; see *Nelson v. O'Neil* (1971) 402 U.S. 622, 626.)

Here, Yanez testified and was cross-examined by the district attorney and counsel for Garcia and Cedeno. Yanez's version of the events put a different spin on the statement in question. After repeatedly stating he played no role in the crimes, Yanez claimed he voluntarily surrendered. According to Yanez, he stopped running to help an officer who had fallen and asked the officer, "Are you okay." Yanez testified he then turned around and put his hands behind his back to be handcuffed. At that time he told the officer, "This is a mistake. This is a big mistake." Yanez was obviously referring to his arrest, not the crime committed. His statement neither inculpates the others nor is it self-incriminating. No one asked Yanez any questions on recross-examination about these statements.

Cedeno argues that the general rule cited by the Attorney General does not apply in this case because Yanez's testimony was "so preposterous that he could not be effectively cross-examined on the statement" made to the arresting officer. The Attorney General does not offer any response to this contention. Nevertheless, Cedeno does not

cite to any authority to support this argument, and we found none. Because Yanez testified, we find no legal or factual reason to hold Cedeno's (and the codefendants') constitutional rights were violated by admission of the statement. Yanez's testimony, in the end, likely helped his codefendants. Yanez essentially said the deputy was wrong about the statement. He claimed he never said the crime was badly planned, only that his arrest was a mistake because he was innocent. If Yanez had affirmed the deputy's version of the statement, Cedeno and the other codefendants would obviously have been in a much worse position. We find no error.

Jury Instruction Issues[4]

(1) Does CALJIC No. 3.00 (Aiding and Abetting) misstate the law?

The court read CALJIC No. 3.00 to the jury, stating, "Persons who are involved in committing a crime are referred to as principals in that crime. Each principal regardless of the extent or manner of participation is equally guilty. Principals include: [¶] (1) Those who directly and actively commit the act constituting the crime, or [¶] (2) Those who aid and abet the commission of the crime."

Pancho contends, "The instruction is contrary to law. He who aids and abets is not 'equally guilty' to the perpetrator 'regardless of the extent or manner of his participation.'" He maintains the instruction unlawfully precludes the jury from finding the aider and abettor guilty of a lesser offense than that of the perpetrator. We find the instruction correctly states the law.

Pancho relies exclusively on the California Supreme Court's recent ruling that an aider and abettor may be found guilty of a greater offense than the direct perpetrator. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1120 (*McCoy*).) He focuses on

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[4] The Attorney General argues that all the following instructional issues were waived. We choose to address the contentions raised, finding each lacks merit.

the court's statement that the "aider and abettor doctrine merely makes aiders and abettors liable for their accomplices' actions as well as their own." (*Ibid.*) And he cites to the court's conclusion that, "guilt is based on a combination of the direct perpetrator's acts and the aider and abettor's *own* acts and *own* mental state." (*Id.* at p. 1117.) He correctly notes the court found that there are circumstances in which the aider and abettor's own mens rea is more culpable than the perpetrator's mens rea. (*Id.* at pp. 1119-1120)

Following this logic, Pancho argues an aider an abettor "surely can be guilty of a lesser crime when his mental state is less culpable than the perpetrator." He maintains, "[I]n cases such as this that do not involve the natural and probable consequences doctrine, only the *acts* of the perpetrator are imputed to the aider and abettor. The aider and abettor's level of guilt is then 'permitted to float free' – tied only the aider and abettor's actual state of mind." He misunderstands the scope of the Supreme Court's holding in *McCoy*.

The Supreme Court explained, "It is important to bear in mind that an aider and abettor's liability for criminal conduct is of two kinds. First an aider and abettor with the necessary mental state is guilty of the intended crime. Second, under the natural and probable consequences doctrine, an aider and abettor is guilty not only of the intended crime, but also 'for any other offense that was "natural and probable consequence" of the crime aided and abetted.' [Citation.] Thus, for example, if a person aids and abets only an intended assault, but a murder results, that person may be guilty of that murder, even if unintended, if it is a natural and probable consequence of the intended assault. [Citation.]" (*People v. McCoy, supra,* 25 Cal.4th at p. 1117.)

The theory that an aider and abettor can be found guilty of a lesser crime than the perpetrator applies only in cases when the People prosecute under the natural and probable consequences doctrine and the facts support a jury finding that the crime

actually committed by the perpetrator was not reasonably foreseeable to the aider and abettor, but the lesser offense was foreseeable. (See *People v. Woods* (1992) 8 Cal.App.4th 1570, 1588.) "Outside of the natural and probable consequences doctrine, an aider and abettor's mental state *must be at least* that required of the direct perpetrator." (*People v. McCoy, supra,* 25 Cal.4th at p. 1118, italics added.) Stated another way, when the charged offense is the same as the intended crime, the aider and abettor must know and share the same intent as the actual perpetrator. Thus in such cases, contrary to Pancho's contention, the aider and abettor's mental state may be *more but never less* culpable than the perpetrator's mental state.

Here, the People did not prosecute Pancho's case under the natural and probable consequences doctrine. Instead, kidnapping for carjacking and kidnapping for robbery were tried as the target offenses that Pancho aided and abetted. Indeed, all the evidence suggests Pancho and his codefendants preplanned all aspects of the heist together. The prosecution never proposed that Pancho and his cohorts intended to commit a different, lesser crime. The court properly instructed the jury that an aider and abettor, and the perpetrator are equally guilty of their intended crime, regardless of the extent or manner of participation. (CALJIC No. 3.00; *People v. McCoy, supra,* 25 Cal.4th at p. 1118.)

(2) Did the court erroneously direct a verdict of guilt?

As an alternative argument, Pancho argues that because the court "told the jurors that Pancho as an aider and abettor was 'equally guilty' to the perpetrators" and the jurors found the perpetrators guilty as charged, the court in essence "directed the verdict against Pancho on the lessers and ordered a verdict of guilty on the greater crimes charged." (Italics omitted.) He argues directing a verdict of guilty violated his constitutional right of due process and trial by jury.

Sounds good, but the premise of his argument is fatally flawed. The court never affirmatively told the jury that Pancho acted as an aider and abettor. Rather, the

jury was given instructions on how to determine whether someone is liable for aiding and abetting. (CALJIC Nos. 3.00 and 3.01.) It was left for the jury to decide whether Pancho aided and abetted in the charged and intended crimes. As noted above, if the jury had concluded Pancho had a less culpable mental state than the perpetrators, he would not have to be found liable as an aider and abettor. This would then leave the jury with the option of either finding Pancho guilty of one of the lesser included offenses (carjacking, robbery, kidnapping, and false imprisonment)[5] or not guilty.

(3) Does CALJIC No. 17.10 adequately express the Dewberry principle?

In *People v. Dewberry* (1959) 51 Cal.2d 548, 555, the court held that "when the evidence is sufficient to support a finding of guilt of both the offense charged and a lesser included offense, the jury must be instructed that if they entertain a reasonable doubt as to which offense has been committed, they must find the defendant guilty of only the lesser offense." (See also Pen. Code, § 1097.) In any case involving a lesser included offense, a *Dewberry* instruction is required sua sponte. (*People v. Aikin* (1971) 19 Cal.App.3d 685, 703-704, disapproved of on other grounds in *People v. Lines* (1975) 13 Cal.3d 500, 514.) Here, the court read CALJIC No. 17.10 to the jury which states in pertinent part, "If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged, you may nevertheless convict [him][her] of any lesser crime, if you are convinced beyond a reasonable doubt that the defendant is guilty of the lesser crime."

Pancho argues CALJIC No. 17.10 "carries the injurious effect of informing jurors that they may convict on the lesser included offense *only if* they (1) affirmatively find defendant not guilty of the crime charged . . . and (2) affirmatively find the defendant guilty of the lesser crime . . . ." He argues this is not what *Dewberry* says –

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[5] There is no dispute the jury was given instructions on the lesser included offenses to consider.

"reasonable doubt as to which offense was committed goes to the defendant. The jurors need not unanimously and affirmatively conclude that defendant did not commit the greater offense before giving him the benefit of that doubt. Rather, they need only conclude an offense was committed and entertain a doubt about whether it was the greater or lesser." Like many other courts, we find the instruction satisfactory.

Pancho's contention that CALJIC No. 17.10 fails to satisfy the *Dewberry* requirements has been widely rejected. (See *People v. Crone* (1997) 54 Cal.App.4th 71, 76; *People v. Gonzalez* (1983) 141 Cal.App.3d 786, 793 (*Gonzalez*), disapproved on other grounds in *People v. Kurtzman* (1988) 46 Cal.3d 322, 330; *People v. St. Germain* (1982) 138 Cal.App.3d 507, 520-522.) Indeed, CALJIC No. 17.10 has been found to be "tailor-made" to express the *Dewberry* principle. (*Gonzalez, supra*, at p. 793.)

The lone dissenting authority on this issue is *People v. Reeves* (1981) 123 Cal.App.3d 65 (*Reeves*) (disapproved on other grounds in *People v. Sumstine* (1984) 36 Cal.3d 909, 919, fn. 6). However, this case has not been followed because, "CALJIC No. 17.10 enunciates what *Reeves* finds that it does not: namely, . . . it instructs the jury that if it finds the prosecution has not sustained its burden of proving each element of the greater of the offenses beyond a reasonable doubt, but finds that the prosecution has sustained its burden of proving the elements of the lesser offense beyond a reasonable doubt, then it must return a guilty verdict of the lesser offense only." (*People v. St. Germain, supra*, 138 Cal.App.3d at p. 522, fn. 9; see also *Gonzalez, supra,* 141 Cal.App.3d at p. 794, fn. 8. ["We disagree with anything in *Reeves* which indicates that CALJIC No. 17.10 by itself was in any way insufficient"].)

Likewise, we are not persuaded by *Reeves.* The opinion contains no meaningful analysis of why it found CALJIC No. 17.10 inadequate. The court merely reiterated the defendant's argument that the greater and lesser offenses should be considered together, and stated that the defendant "appear[ed] to be correct" that the instructions as given were in error. The court then immediately went on to discuss why

the error was harmless, finding the evidence of guilt was "overwhelming." (*Reeves, supra,* 123 Cal.App.3d at pp. 69-70.) We recognize there may be a distinction between informing jurors they must give the defendant the benefit of any reasonable doubt as to the nature of the offense, and advising them that if they have a doubt the defendant committed the greater offense, they may return a verdict on the lesser. Nevertheless, CALJIC No. 17.10 conveys the essential principle the jury must choose the lesser offense if it entertains a reasonable doubt as to the greater crime. The instruction correctly informed the jurors they should not convict defendant of the crimes charged if they harbored a reasonable doubt as to any element of those crimes. Moreover, in addition to reading CALJIC No. 17.10, the jury was also given the standard instruction on reasonable doubt (CALJIC No. 2.90). Read together, those instructions clearly told the jury that the People bear the burden of proving guilt beyond a reasonable doubt. (See *People v. Espinoza* (1992) 3 Cal.4th 806, 824.)

(4) Is CALJIC No. 17.03 incorrect as a matter of law?

The court read to the jury CAJLIC No. 17.03, stating, "The defendant is accused in count one of having committed the crime of carjacking and in count two of having committed the crime of kidnapping for carjacking. These charges are made in the alternative and in effect allege that the defendant committed an act or acts constituting one of the charged crimes, you then must determine which of the crimes so charged was thereby committed. [¶] In order to find the defendant guilty you must all agree as to the particular crime committed, and, if you find the defendant guilty of one, you must find him not guilty of the other, as well as any lesser crime included therein. [¶] The court cannot accept any verdict of guilty as to any lesser crime, unless you unanimously find that the defendant is not guilty as to the greater crime"

Pancho asserts the instruction is incorrect as a matter of law. He focuses entirely on the short phrase "if you find the defendant guilty of one, you must find him not guilty of the other." He concludes the instruction improperly informs the jury that it

must reject a greater charged offense before returning a guilty verdict on a lesser charged offense. He points out that both "statute and case law require that trial courts accept a verdict on a lesser charged offense regardless of whether the jurors are able to agree on the greater charge." (Pen. Code, § 1160; *People v. Blair* (1987) 191 Cal.App.3d 832, 839.)

If CALJIC No. 17.03 consisted of only the short phrase highlighted by Pancho, he would have a good argument. Of course, such is not the case. The phrase is part of a much larger sentence that cannot be ignored and, of course, that sentence must be viewed in context with the whole instruction.

The challenged phrase is part of the sentence that reads, "In order to find the defendant guilty you must all agree as to the particular crime committed, and, if you find the defendant guilty of one, you must find him not guilty of the other." (CALJIC No. 17.03.) The first part of the sentence tells the jury it must unanimously agree on the crime committed. This is a correct statement of law. Contrary to Pancho's contention, the second part of the sentence does not direct the jury to first "all agree" he was not guilty of the alternatively charged crime. Rather, it informed the jury that once a crime has been decided, the defendant cannot be found guilty of the alternatively charged crime. This correctly conveys the legal concept that a defendant cannot be convicted of multiple crimes for the same act. (*People v. Black* (1990) 222 Cal.App.3d 523, 525.) Since there was no evidence here of more than one carjacking, the trial court had a sua sponte duty to give CALJIC No. 17.03. (*Ibid.*)

(5) Does CALJIC No. 2.51 mislead the jury?

The trial court read CALJIC No. 2.51 to the jury which states: "Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish the defendant is guilty. Absence of motive may tend to show the defendant is not guilty."

Pancho maintains there are nine similar standard evidentiary instructions that contain an admonishment that certain evidence from which guilt may be inferred "is not sufficient by itself to prove guilt." (Citing CALJIC No. 2.03 [falsehood as consciousness of guilt]; CALJIC Nos. 2.04 & 2.05 [fabricating evidence]; CALJIC No. 2.06 [efforts to suppress evidence]; CALJIC No. 2.15 [possession of stolen property]; CALJIC No. 2.16 [dog-tracking evidence]; CALJIC No. 2.50.01 [other sexual offenses]; CALJIC No. 2.50.02 [other domestic violence]; and CALJIC No. 2.52 [flight after crime].) He points out that this admonishment is noticeably missing from CALJIC No. 2.51. Pancho asserts the jury looking at all the instructions in this case would have noticed that the cautionary language was missing from CALJIC No. 2.51 and would have concluded this omission was intentional. He concludes the instruction may have led a reasonable jury to believe guilt may be based solely on the presence of his alleged motive to carjack or steal from the victim. We disagree.

"In reviewing any claim of instructional error, we must consider the jury instructions as a whole, and not judge a single jury instruction in artificial isolation out of the context of the charge and the entire trial record. [Citations.] When a claim is made that instructions are deficient, we must determine whether their meaning was objectionable as communicated to the jury. If the meaning of instructions as communicated to the jury was unobjectionable, the instructions cannot be deemed erroneous. [Citations.] The meaning of instructions is no longer determined under a strict test of whether a 'reasonable juror' *could* have understood the charge as the defendant asserts, but rather under the more tolerant test of whether there is a 'reasonable likelihood' that the jury misconstrued or misapplied the law in light of the instructions given, the entire record of trial, and the arguments of counsel. [Citations.]" (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 276-277.)

CALJIC No. 2.51 did not inform the jury motive was enough to prove guilt. Rather, it specifically stated the presence of a motive "may tend to establish" guilt. We

must presume the jurors were capable of understanding the instruction (*People v. White* (1987) 188 Cal.App.3d 1128, 1138-1139, overruled on another point in *People v. Wims* (1995) 10 Cal.4th 293, 314, fn. 9), and followed the instructions as given (*People v. Osband* (1996) 13 Cal.4th 622, 714). A common sense reading of the instruction would not lead a reasonable juror to find guilt beyond a reasonable doubt based on nothing more than evidence Pancho had a motive to commit the crime. This conclusion is supported by the fact three other important instructions were given in this case: CALJIC No. 2.90 told the jury that the People had to establish guilt beyond a reasonable doubt; CALJIC No. 1.01 told the jury to consider the instructions as a whole; and CALJIC No. 2.01 told the jury that when evaluating circumstantial evidence "each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt." Under these circumstances, no reasonable juror would have applied CALJIC No. 2.51 in the manner suggested by Pancho.

(6) Was there cumulative error?

Pancho asserts the cumulative effect of the errors described in his opening brief caused him prejudice. We have found no errors. Accordingly, this claim has no merit.

(7) Did the court have a sua sponte duty to instruct on the defenses of necessity and duress?

Yanez argues the court had a sua sponte duty to instruct on the defenses of necessity and duress because he relied on these defenses. Alternatively, he argues that even in the absence of such a duty, his trial counsel's failure to seek such an instruction constituted ineffective assistance of counsel. We find these contentions lack merit.

"Except as to crimes that include lack of necessity (or good cause) as an element, necessity is an affirmative defense recognized based on public policy considerations. [Citations.] To justify an instruction on the defense of necessity, a defendant must present evidence sufficient to establish that she violated the law (1) to

prevent a significant and imminent evil, (2) with no reasonable legal alternative, (3) without creating a greater danger than the one avoided, (4) with a good faith belief that the criminal act was necessary to prevent the greater harm, (5) with such belief being objectively reasonable, and (6) under circumstances in which she did not substantially contribute to the emergency. [Citations.] [¶] Here, [Yanez's] evidence was insufficient to permit a reasonable jury to find that these elements were established and thus neither the trial court nor defense counsel committed error. [Citation.]" (*People v. Kearns* (1997) 55 Cal.App.4th 1128, 1134-1135; CALJIC No. 4.43.)

Yanez argues his testimony alone was sufficient to meet all the requirements of the necessity defense. He claims the only reason "he was present during, and at worst participated in," the crimes was "because he was beaten and threatened with a gun. To disobey could have resulted in imminent harm if not death. At the time the incident was occurring, [he] did not have the means to engage in a reasonable legal alternative, other than to resist and restrict his level of participation, as he did." Yanez concludes, "The harm likely to be caused by the acts was a theft offense, albeit with threat of harm." In short, he claims any illegal acts committed were justified under the circumstances.

At first glance this looks like a good argument, but after closely reviewing Yanez's testimony, we find it is not supported by the record. True, Yanez testified that he was in fear for his life after being physically assaulted, robbed of his wallet, trapped in a truck, and kidnapped. Certainly, these dire circumstances may have led a reasonable person to believe a criminal act was necessary to prevent a greater harm. However, Yanez never claimed to have had this mindset. To the contrary, he unequivocally asserted that he refused to participate in any crime and, despite his codefendants' aggressive commands, he did not commit any illegal acts. His story is one of an innocent victim, not an unwilling criminal participant. Based on Yanez's testimony, there was

simply no reason for the trial court or trial counsel to consider the necessity defense, much less contemplate giving the jury instructions on the defense.[6]

Similarly, we find no evidence supporting the defense of duress. As correctly noted by Yanez, there is a difference between the defenses of duress and necessity. (*People v. Heath* (1989) 207 Cal.App.3d 892, 900-901.) "[T]he necessity defense is founded upon public policy and provides a justification distinct from the elements required to prove the crime. [Citation.]" (*Ibid.*) The duress defense "negates an element of the crime – the intent to commit the act. The defendant does not have the time to form criminal intent because of immediacy and imminency of the threatened harm and need only raise a reasonable doubt as to the existence or nonexistence of this fact." (*Id.* at p. 901.) As it turns out, this distinction is of no matter here. Both defenses share the common requirement of evidence showing the defendant was an unwilling criminal participant. As noted above, Yanez testified that while he feared for his life, he was nevertheless able to avoid all criminal misconduct. Such evidence simply does not warrant an instruction on the duress defense. The trial court has a duty to instruct on relevant principles of law and the "correlative duty 'to refrain from instructing on principles of law which not only are irrelevant to the issues raised by the evidence but

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[6] We are surprised that the Attorney General responded to this contention by focusing on the second element of the necessity defense, arguing Yanez had reasonable legal alternatives to committing the crimes. Specifically, the Attorney General argues that Yanez could have used his cell phone or run away rather than drive the UPS truck. The Attorney General adds that if he truly feared his codefendants, Yanez would not have run away from the police and would have given the police his legal name. This argument is apparently based on the premise that the jury may have only believed part of Yanez's testimony, i.e., that Yanez lied about refusing to drive the UPS truck but truthfully stated he was threatened and assaulted by his codefendants. But this concoction was not the defense Yanez presented at trial. The court and his trial counsel cannot be faulted for failing to anticipate this alternative scenario that the Attorney General now seems to endorse.

also have the effect of confusing the jury or relieving it from making findings on relevant issues.' [Citations.]" (*People v. Saddler* (1979) 24 Cal.3d 671, 681.)

(8) Did the court have a sua sponte duty to give accomplice instructions?

Garcia maintains the trial court erred by failing to give sua sponte cautionary instructions about the testimony of accomplice Yanez exonerating himself and incriminating Garcia. Citing to *People v. Guiuan* (1998) 18 Cal.4th 558 (*Guiuan*), Garcia asserts all applicable accomplice instructions should be given any time an accomplice or possible accomplice testifies. He misapplies the ruling of that case.

In *Guiuan* the court changed some of the law on accomplice instructions. The prior law was as stated in *People v. Williams* (1988) 45 Cal.3d 1268, 1314, that when an accomplice (not a defendant) was called as a witness by the People, the court was required to "instruct the jurors sua sponte to distrust his testimony. [Citations.] When, by contrast, he [was] called by the defendant, the instruction [would] be given only at the defendant's request. [Citations.] Finally, when he [was] called by both parties, the instruction [would] be tailored to relate only to his testimony on behalf of the prosecution."

The court in *Guiuan* set forth a new prospective instruction: "[T]he jury should be instructed to the following effect whenever an accomplice, or a witness who might be determined by the jury to be an accomplice, testifies: 'To the extent an accomplice gives testimony that tends to incriminate the defendant, it should be viewed with caution. This does not mean, however, that you may arbitrarily disregard that testimony. You should give that testimony the weight you think it deserves after examining it with care and caution and in the light of all the evidence in the case.' Such a pretailored instruction is applicable regardless which party called the accomplice." (*Guiuan, supra,* 18 Cal.4th at p. 569.) The court determined that this instruction should be given sua sponte. (*Ibid.*)

The accomplices who testified in *Guiuan* were not codefendants, and thus the issue we must decide is whether *Guiuan* applies when, as was the case here, the testifying accomplice is also a codefendant. Although the Attorney General fails to mention or discuss *Guiuan* in the respondent's brief, he makes a similar type of argument, boldly stating that accomplice instructions were not required at all because Yanez was a codefendant, and "as such, the defense had a full and fair opportunity to cross-examine Yanez and the jury was able to evaluate his credibility." This contention is made without any supporting legal authority. We are not persuaded by the Attorney General's argument. But, for a different reason, we conclude *Guiuan* does not apply in this case.

We find *People v. Box* (2000) 23 Cal.4th 1153, 1208 (*Box*), a California Supreme Court opinion evidently overlooked by both parties, to be instructive. In that case, the trial court denied the defendant Box's request for the cautionary accomplice instructions, ruling it was "inapplicable when the accomplice was a codefendant, and it would be fundamentally unfair to Flores [the testifying codefendant]." Flores had testified on his own behalf, attempting to exonerate himself and incriminate Box. The court recognized *Guiuan* was "not directly controlling [because neither the prosecution nor defendant called Flores as a witness]. Nevertheless, just as in the case of an accomplice called to testify by the prosecution, Flores's testimony was 'subject to the taint of an improper motive, i.e., that of promoting his . . . own self interest by inculpating the defendant.' [Citation.] Thus, there appears to be no persuasive reason not to require such an instruction *when requested by a defendant* in a case where the codefendant testifies. [Citation.] Accordingly, here, the trial court should have instructed the jury to view Flores's testimony with care and caution to the extent it tended to incriminate defendant." (*People v. Box, supra,* 23 Cal.4th at p. 1209, italics added.)

The case before us is factually distinguishable. In *Box* the cautionary accomplice instruction was requested and, therefore, the Supreme Court did not have to

consider whether it should have been given sua sponte in cases where a codefendant testifies without being called by either the People or the other defendants. We find no reason, and the parties offer none, to require that the accomplice instruction be given sua sponte when a codefendant testifies. As noted long ago by the Supreme Court in *People v. Terry* (1970) 2 Cal.3d 362 (*Terry*), disapproved on another ground by *People v. Carpenter* (1997) 15 Cal.4th 312, it may be highly prejudicial to the testifying defendant to give a cautionary instruction, for the jury is then told that the law requires that he be considered untrustworthy. (*Id.* at pp. 398-399; see also *People v. Fowler* (1987) 196 Cal.App.3d 79, 87.) Accordingly, the court in *Terry* concluded, "it would appear that where a defendant testifies in his own behalf and denies guilt while incriminating a codefendant, it is at most for the discretion of the trial judge whether to give accomplice testimony instructions on his own motion." (*People v. Terry, supra* 2 Cal.3d at p. 399.) There is no reason to hold that this *Terry* rule has been abrogated by *Guiuan*. Accordingly, we conclude the trial court in this case had no sua sponte duty to give the cautionary accomplice instructions.

Moreover, we find Garcia was not prejudiced by the absence of the accomplice instruction. "Failure to instruct pursuant to section 1111 is harmless if there is sufficient corroborating evidence. Corroborating evidence may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense. [Citations.]" (*People v. Hayes* (1999) 21 Cal.4th 1211, 1271.)

Here, as indicated above, there was sufficient corroboration of Garcia's involvement in crimes. He helped his cohorts by obtaining the blue van. There is some evidence suggesting he drove the van. Finally, there certainly is ample evidence he aided and abetted in with the others in their preorchestrated scheme to steal the computer memory parts.

Garcia argues that "failure to give accomplice instructions constitutes error under the federal constitution." He maintains the instructional error "diluted the

appropriate standard of proof" below the reasonable doubt standard and mandates reversal. Not so. As noted by the California Supreme court in *People v. Lewis* (2001) 26 Cal.4th 334, 371, "Notwithstanding defendant's citation of federal and state Court of Appeal cases, we have observed that '[n]o cases have held failure to instruct on the law of accomplices to be reversible error per se.' [Citation.]" The federal Constitution does not require the accomplice corroboration rule. (See *People v. Frye* (1998) 18 Cal.4th 894, 968.)[7]

The judgment is affirmed.

O'LEARY, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

MOORE, J.

[7] We feel compelled to remind the Attorney General that responsible advocates should provide specific detailed responses to each argument raised on appeal, with appropriate case authority and record citations. The Attorney General's briefing in this case lacking.